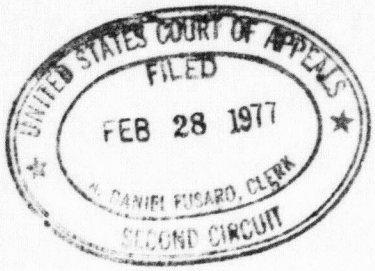
***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF




76-7442

NOS. 76-7451

CONSOLIDATED

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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OSCAR ROBERTSON, et al.,

Plaintiffs-Appellees

CHESTER WALKER, CLIFFORD RAY and WILTON N. CHAMBERLAIN,

Appellants

vs.

NATIONAL BASKETBALL ASSOCIATION, et al,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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# REPLY BRIEF OF APPELLANT CHAMBERLAIN

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## PRELIMINARY STATEMENT

In September and October, 1975 appellant Wilton N. Chamberlain (hereinafter "Chamberlain") was not playing and was not under contract to play basketball in the NBA.* However, Chamberlain was desirous of returning to play in the NBA commencing with the 1975/1976 playing season. (JA. 724)** Having expressed that desire and having determined that there was interest on at least the part of some of the NBA teams (JA. 1321, 1486-87), Chamberlain also found that there existed a boycott against him which prevented him from freely contracting to play with a team of his choice. This boycott was in the form of a requirement that payments be made to the Lakers by any NBA team contracting with Chamberlain. (JA. 723-24) No NBA team extended Chamberlain an offer to play. (JA. 724) Chamberlain offered to report for play with the Lakers. (JA. 723) The Lakers "suggested" that he refrain from reporting in order "to avoid any possibility of embarassment". (JA. 726)

As a result of these events and for the injury suffered by Chamberlain as a result of these events, Chamberlain filed an

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* Chamberlain's last contract to play basketball in the NBA was a two-year contract for the 1971/1972 and 1972/1973 playing seasons. An additional obligation of Chamberlain to play basketball for the Lakers in the NBA for the 1973/1974 playing season was terminated when Chamberlain "sat-out" the season.

** All references herein are designated as follows: to the Joint Appendix as "JA."; to the Joint Brief of Appellants on the Common Issues as "J. Br."; to Appellant Chamberlain's Supplemental Brief as "Supp. Br."; to the Brief of Defendants-Appellees as "NBA Br."; to the Brief of Plaintiffs-Appellees, as "Pl. Br."; to the Record for purposes of appeal, as "R".

action in the United States District Court for the Central District of California.*

The events set forth above gave Chamberlain a new cause of action which did not exist and could not have subjected the NBA to a claim for damages by Chamberlain or anyone prior to that specific point in time. Lawlor v. Nat'l Screen Service Corp. 349 U.S. 322, 327-28 (1955); Zenith Radio Corp. v. Hazeltine Research, Inc., 401 1.S. 321, 339 (1971) And, the appellees do not dispute that such is the case.

The record discloses and the appellees apparently agree that the amount of compensation which Chamberlain could have expected for a one year contract to play the 1975/1976 season, and therefore the minimum amount of single damages on this cause of action, was approxiamtely $450,000. (NBA Br. 14)

All of the issues presented by Chamberlain on this appeal relate to the question of whether Chamberlain's cause of action for single damages of at least $450,000 which is predicated upon these events has been adjudicated by the Final Consent Judgment entered by the court below.**

The challenge that Chamberlain has raised as it relates to the 23(b)(1) certification (Issues Presented For Review,

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* Wilton N. Chamberlain v. National Basketball Association, et al., (75 Civ-4258 AAH)

** Paragraph 7 of the Stipulation and Settlement Agreement provides that class members will not sue the Settling Defendants with respect to any claim relating to or arising out of the claims set forth in the Complaints. (JA. 904) This restriction on a class member's right to institute an action presumably covers a claim for damages no matter when it accrued or accrues - prior to certification, prior to final judgment, or at any time in the future.

Nos. 2 and 5) and the adequacy of the Settlement (Issues Presented for Review, No. 4) is raised in this context.

It is respectfully submitted by Chamberlain that upon the record in the court below this court can determine as a matter of law that Chamberlain's damage claim based upon the events which occured in the fall of 1975 could not be adjudicated by the Final Consent Judgment.*

It is also respectfully submitted that the matters raised by the appellees in response to Chamberlain's appeal simply do not respond to the central thrust of Chamberlain's arguments.

## ARGUMENT

### A. Fairness of The Settlement

With respect to the fairness of the Settlement Chamberlain's appeal only challenged its fairness to the extent it adjudicated his separate claim. Since the court below has in essence said that it has not determined that that claim has been adjudicated, it is difficult to understand how the court could have concluded that the Settlement was fair specifically with respect to Chamberlain.

In apparent recognition of that problem, appellees have attempted to characterize any damage to Chamberlain as being "self-inflicted".

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* While the record discloses that the court below left open the question of whether this claim of Chamberlain has been adjudicated in terms of whether it is "related" to the claims set forth in the Complaints (JA. 1682-83), it appears that it has concluded that the class certification determination reached in February, seven (7) months prior to the accrual of the claim could without further evaluation extend to cover this claim.

Central to this characterization is the NBA's conclusory statement set forth in the affidavit of Michael Burke that "[b]ased upon my experience with Mr. Chamberlain, it is my conclusion that he was not interested in playing professional basketball in 1975-76." (JA. 1322)

In essence, the argument advanced is that Chamberlain has no objection based upon the events of the fall of 1975 because he really did not intend to play and thus could not have suffered any separate injury at that time. Needless to say the conclusory statement of Mr. Burke as to Chamberlain's intention (and alleged injury) is not evidence even if undisputed as the NBA alleges. (NBA Br. 14; 7-10)* However, that conclusion is certainly disputed on the record and was disputed even prior to the filing of Mr. Burke's affidavit by the affidavit of Mr. Goldberg filed in opposition to the NBA's application for a preliminary injunction wherein it is unequivocally stated that "Mr. Chamberlain would have been delighted to entertain an offer of employment for the year 1975-76 and future years. None was made by any team." (JA. 724

Other statements made by the appellees to support their claim that any separate injury to Chamberlain was self-inflicted including the assertion that Chamberlain was not excluded from playing in the NBA and earning full salary under his contract with Los Angeles (Pl. Br. 28) simply ignore the

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* Since Mr. Burke's affidavit was served on Chamberlain's counsel by hand only at the eleventh hour before the June 23, 1976 hearing so that no response to the self-serving statements therein could have been possible, it is surprising that the affidavit is relied upon so totally.

undisputed evidence of the Laker's refusl to let Chamberlain report to them after he offered to do so. (JA. 723, 726)

The claim that no evidence was produced by Chamberlain to show that the Settlement would not be fair to him even assuming the adjudication of his separate cause of action also ignores the evidence in the record of the facts set forth above at pp. 1-2 concerning the precise nature and magnitude of the injury incurred by Chamberlain in the fall of 1975.

It also ignores the fact that the record before the court below unequivocally established that no alleged member of the class other than Chamberlain ever went without a contract to play as a result of the "compensation plan".* Thus while consideration of the impact of the decision in Kapp v. Nat'l Football League, No. C 72 537 (N.D. Cal. 1976), may have been of substantial concern to the plaintiffs because they all could play for someone, this could not have been the case with Chamberlain's claim. The Lakers refused to let him report (JA. 726) and the other teams could not freely negotiate with Chamberlain because of the boycott.

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* The record discloses that only four players ever reached "free agent" status which would be subject to the so-called "compensation plan" (JA. 1433, 1457, 1465); that only one of these, Cazzie Russel, had the so-called "compensation plan" applied to his activities (JA. 490); and that he had contracted with the new team prior to any question of compensation being raised so that virtually eliminated any possibility that the restraint had any effect on his ability to get his top dollar in the new contract.

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The NBA's suggestion that Chamberlain's delay in moving the court below on the question of what, if anything, of Chamberlain's California action survives the judgment is strong evidence of the lack of merit of Chamberlain's objections (NBA Br. 20) is refuted by the court's ruling that such a motion is "premature".* **

Finally, the alleged concession of Chamberlain's counsel that there is no objection to the settlement is simply whole cloth. (NBA Br. 20) Chamberlain's position has always been that if he is free to pursue the separate claim he has and which he believes is not subject to adjudication under the Settlement he has no objection to the Settlement to the extent it relates to others of his claims which are properly included within the class. If, however, the Final Consent Judgment entered by the court below precludes Chamberlain from pursuing that cause of action, Chamberlain objected to the Settlement.

B. Appealability of Class Determination

It is respectfully submitted that to the extent Chamberlain has sought review of the 23(b)(1) class determination (as is set forth below), the request is not untimely.

The notice of the pendency of a class action did not

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* Ruling at hearing on February 24, 1977.

** It is interesting to note however that the NBA is desirous of avoiding any ruling on the merits of that issue since in this court they argued that Chamberlain was "tardy" while in the court below they argued that the court should defer any motion until after the appeal.

set forth any immediate right of an alleged class member to contest or appeal the court's finding (JA. 537), and in fact there would be no right to appeal such a decision until entry of final judgment. Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), cert. denied, 50 L.Ed. 2d 75 (1976). To accept the argument the appellees have advanced on this issue that questions concerning the class determination as it related to Chamberlain's separate cause of action cannot now be raised on this appeal would preclude ever having the propriety of an erroneous class determination tested by an alleged class member when a settlement was reached between the Plaintiff and Defendants.

Moreover, the NBA's argument that Chamberlain by his present appeal is attempting "to gain the best of both worlds" in terms of his position in the class action (NBA Br. 50) is refuted by the very fact Chamberlain instituted his own action after the events of the fall of 1975. Clearly to the extent the court below included this cause of action within its 23(b)(1) certification, Chamberlain did not sit back. Rather than Chamberlain failing to take any step which would indicate that he would opt-out on this claim as the NBA alleges (NBA Br. 51), it was the NBA asking the court below to stop his attempted opt-out on the claim.

C. Impropriety of Relating Original 23(b)(1) Class Certification to Chamberlain's New Damage Claim

Chamberlain respectfully submits that the appellees' discussion of the propriety of the original class determination which was made by the court below in February, 1975 misses the

mark in terms of Chamberlain's claim on this appeal. The question is not whether the 23(b)(1) certification was proper in any context, but whether it was proper to the extent the appellees and the court below sought to have it extend to the cause of action of Chamberlain which accrued after the 23(b)(1) determination was made without making a new determination that all of the requisites of Fed.R.Civ.P.23 were met vis-a-vis Chamberlain's new cause of action. This is particularly true considering the magnitude of Chamberlain's injury.

The damage liability period which the court below sought to create was for acts through the final judgment (JA. 539). Such a liability period for damages determined in advance of the actual accrual of causes of action such as in Chamberlain's case ignores the mandates of Fed.R.Civ.P.23 that the representative claims and plaintiffs must meet certain criteria, because those determinations cannot be made until the injury occurs. See Wainwright v. Kraftco Corp., 58 F.R.D. 9 (N.D. Ga. 1973) wherein the court, in denying a motion to amend, recognized that an extension of the liability period of the defendants for damages would necessarily involve the reopening of the class determination with the possible consequence of redefining the class.

When the court below enjoined Chamberlain from prosecuting his California action, it made no new determination that Chamberlain's new cause of action could be adequately represented by the class plaintiffs and that there would be no conflict involved in having Chamberlain's cause of action handled on a representative basis. The court simply extended

its earlier determination once it concluded that the restraint which was implemented when Chamberlain sought to return to the NBA was similar to the reserve clause compensation plan which it considered to be in this case.

But, it is respectfully submitted that Chamberlain's circumstances at that time precluded the possibility that this new cause of action would be adequately represented by the plaintiffs. Chamberlain was an ABA player for a defunct ABA franchise and he did not even have the option to contract with and earn a salary with one NBA team. The Lakers who claimed "rights" to him would not let him play. Moreover, since Chamberlain was 39 years old at the time, once the restraint as implemented foreclosed his ability to freely contract to play for the 1975/1976 season, there was a distinct possibility that damages might be the only form of meaningful relief. Certainly considering Chamberlain's age, an elimination of the restraint in 1981* may not be very meaningful.

In recent class action determinations, the courts are giving more and more consideration to the question of conflicts and potential conflicts between alleged members of the class and as a result refusing class certification. See Memorandum And Order, pp. 7-8, Nielsen v. Alaska Packers Ass'n., Inc. No. A 75-69 Civil (United States District Court, District of Alaska, Nov. 10, 1976).

Air Line Stewards and Stewardesses Association, Local

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* As is set forth in Supp. Br. at pp. 23-24 there is some question whether Chamberlain can be subject to any type of compensation rule. However, it is clear that he is being subjected to some such rule. (Supp. Br. 24)

550, TWU, AFL-CIO v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973) and Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973) cited by Chamberlain in his Supplemental Brief recognize that the conflict may not be apparent at the outset of the litigation but may also arise during the course of the litigation. Moreover, in both of those cases it was the type of relief being sought or likely to be sought which presented the basis for the conflicts which were found to exist.

The central holding of these cases cannot be dismissed by the statement that they are inapplicable to this case because the plaintiffs secured both money damages and injunctive relief. The question is whether Chamberlain's interest as to obtainable relief on his new cause of action could be adequately protected by the class representatives and whether there was a likelihood that the class representatives might compromise Chamberlain's obtainable relief based on consideration of circumstances which were relevant to them but might not be relevant to Chamberlain.

Chamberlain respectfully submits that this was clearly the case with respect to his new cause of action.* Chamberlain's damages on his new cause of action were defined by the fact that he did not receive a contract for $450,000 or

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* This is true if for no other reason than the fact that the result in the Kapp case, supra, posed a more serious problem to the plaintiffs than to Chamberlain since his new cause of action involved circumstances where he was not permitted to contract with the Lakers.

It is possible that this conflict might have been resolved in the plaintiffs' favor if any consideration had been given to the difference in the Settlement. But allocation was skewed not toward the events Chamberlain complained about in 1975, but toward the earlier years.

any amount. The plaintiffs' claims, if in fact for the same type of restraint, were defined by an indeterminant incremental increase to the contracts they had or, in the case of future players, might have.

When the interests of Chamberlain with respect to his new cause of action were not adequately represented by the plaintiffs, as Chamberlain submits was the case, his interest in controlling the adjudication [or settlement] of that cause of action was paramount and it rises to the level of a due process requirement. Nguyen Da Yen v. Kissinger, 70 F.R.D. 656, 668 (N.D. Cal. 1976), Hansberry v. Lee, 311 U.S., 32, 41-42 (1940).

Chamberlain's challenge on this appeal to the class certification being extended to his new cause of action is not, as is suggested by the appellees (NBA Br. 42), a matter of having his cake and eating it too. Nor is it an attempt to accept benefits accruing from six years of litigation and spoil a settlement at the last minute. (Pl. Br. 69-70) It is simply a question of resolving whether Chamberlain's new claim for damages which accrued as a result of the events set forth above could properly be adjudicated in this proceeding. If the appellees formulated a Settlement which must be totally overturned if Chamberlain is correct that this new claim could not be adjudicated in this class proceeding, then the turmoil which they claim will be revisited on the professional basketball scene (NBA Br. 41-42; Pl. Br. 69-70), is not Chamberlain's fault, but rather is the appellees' own fault resulting from their own overreaching in their attempt to have adjudicated in the Settlement a claim which was not properly before the court.

When Chamberlain suffered the new injury he filed a separate lawsuit. This told all parties his position on his new damage claim. Again at the hearing on the preliminary injunction Chamberlain's attorney advised all parties that it was his position that this one claim for damages could not be a part of the representative claims. In fact, counsel for the plaintiffs acknowledged at the preliminary injunction hearing that the plaintiffs had been told by the NBA that the events of the fall of 1975 concerning Chamberlain were "not in our case" (JA. 1415). Under these circumstances it is difficult to imagine how a Settlement could be reached between the players and the NBA which is now alleged to be completely dependent upon whether Chamberlain's new claim can or cannot be adjudicated by a compromise reached between the NBA and the plaintiff class purporting to represent Chamberlain's interest on that claim. But, however fantastic that proposition is, if it is true,it does not provide the basis for this court to override Chamberlain's interest.

D. Final Consent Judgment and Res Judicata

In what can only be described as an exercise in sophistry, the NBA has argued that this Court cannot determine on this appeal the res judicata effect of the judgment below. (NBA Br. 55) But, what the NBA failed to point out is that it is precisely for that reason that the court below included in its final judgment provisions which purport to vest it with exclusive jurisdiction to do just that that Chamberlain

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as taken the present appeal.*

Certainly this court can conclude as a matter of law that Chamberlain's cause of action accruing in the fall of 1975 cannot be finally adjudicated by the Final Consent Judgment. And, it is only this that Chamberlain has asked the court to do.

E. The Injunctive Aspect of the Judgment of the Court Below

The current state of the record indicates that there is some question concerning the current status of the injunction which was entered preventing Chamberlain from pursuing his California action (JA. 1662-63). This question, however, is also related to the question of whether Chamberlain's new cause of action has been adjudicated by the Final Consent Judgment. Moreover, since the Final Consent Judgment contains provisions which purport to restrict the right of alleged class members to bring suit (Settlement, ¶7, JA. 904) and provisions which purport to invest the court below with continuing jurisdiction to enforce the terms of the Settlement, including ¶7 (Settlement, ¶8, JA. 905), Chamberlain is in essence enjoined from prosecuting his California lawsuit** even though the court below did not yet make a determination as to

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* Chamberlain's first issue presented for review as set forth in his Supplemental Brief at p.2 reads as follows:

"1. Does the District Court have jurisdiction over the person of Chamberlain, a non-party class member, which permits it to vest itself with the exclusive jurisdiction within which the res judicata effect of its judgment to certain events upon which Chamberlain instituted a separate action in California must be determined?"

** Presumably if Chamberlain were to begin prosecuting his California action he would be subject to contempt under the Settlement provisions just as if he were subject to a preliminary injunction.

what he would permit Chamberlain to sue on in his California action. In this sense Chamberlain is still preliminarily enjoined and the relief he seeks in this Court concerning the original decision of the court below on the preliminary injunction is appropriate.

## CONCLUSION

For all of the reasons set forth in the two opening briefs of Chamberlain and for the reasons set forth herein, Chamberlain respectfully requests this Court to grant the relief he has prayed for.

Dated: February 28, 1977

Respectfully submitted,


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CERTIFICATE OF SERVICE BY MAIL

I, Sheryl K. Snyder , declare under penalty of perjury:

That I am a citizen of the United States, over the age of eighteen years and not a party to or interested in the within entitled cause. My business address is Russ Building, Suite 420, 235 Montgomery Street, San Francisco, California 94104.

That I served by mail the following document:

Two true copies of REPLY BRIEF OF APPELLANT CHAMBERLAIN.

by enclosing two copies of the said document in a separate postage paid, sealed envelope(s) addressed as follows and today placing the said envelope(s) in a regularly maintained United States Postal Service mail depository in the City and County of San Francisco, California.

To the persons listed on Exhibit A, attached.

DATED: February 27, 1977
San Francisco, California

Sheryl K. Snyder

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